

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY)	
AVERAGE WHOLESALE PRICE)	MDL No. 1456
LITIGATION)	
)	CIVIL ACTION: 01-CV-12257 PBS
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THIS DOCUMENT RELATES TO ALL)	Judge Patti B. Saris
CLASS ACTIONS)	
)	

**PLAINTIFFS' OPPOSITION TO DEY, INC.'S AND ABBOTT LABORATORIES'
OBJECTIONS TO CHIEF MAGISTRATE JUDGE BOWLER'S ORDER
DENYING FURTHER DISCOVERY OF MASSACHUSETTS HEALTH PLANS**

Plaintiffs oppose defendants' objection to Chief Magistrate Judge Bowler's order denying further discovery of Massachusetts health plans. Chief Magistrate Judge Bowler ruled that further discovery of Massachusetts health plans was unwarranted, that the burden of the discovery sought on these absent class members was "quite dramatic," and that disclosure of health plan contracts and other confidential documents within the small community of Massachusetts health plans would impose unnecessary risks of prejudicial disclosure on the Massachusetts health plans. Magistrate Bowler ruled based review of extensive briefing by plaintiffs, three Massachusetts health plans, and two defendants; substantial evidentiary submissions, including affidavits by health plan officers; and lengthy oral argument. Magistrate Bowler's ruling was not clearly erroneous and it should be affirmed. The argument and ruling are set forth in the transcript of hearing dated February 2, 2006 at 21-48. A copy of the transcript of the hearing is annexed hereto as exhibit A.

I. INTRODUCTION

During the Track I discovery phase of this case, defendants subpoenaed *over 40* health plans, covering *more than 50 percent* of all persons in the United States who have health insurance. Included in this campaign were subpoenas directed to Massachusetts health plans Blue Cross Blue Shield of Massachusetts (“BCBSMA”) and Harvard Pilgrim Health Care (“HPHC”), which together represent *more than 50 percent* of the covered lives in Massachusetts. To date, defendants have taken *six* depositions of BCBSMA and *four* depositions of HPHC, and have collected many thousands of pages of documents from each. Defendants obtained the Court’s permission to obtain this broad absent class member discovery based upon repeated representations that they had constructed a representative on third-party payors and that discovery from each of the prospective deponents was needed to satisfy the sampling requirements.

Having obtained discovery from health plans representing 50 percent of the covered lives nationally and 50 percent of the covered lives in Massachusetts – far more than any reasonable sample would require – in November 2005, defendants issued *four more* health plan subpoenas, to Tufts Associated Health Plans, Inc. (“Tufts Health”), Neighborhood Health Plan, Inc. (“Neighborhood Health”), Fallon Community Health Plan (“Fallon Community”), and *another* subpoena to HPHC. With Track I discovery closed, the subpoenas were purportedly issued on behalf of Track II defendant Dey, Inc. (“Dey”) and Abbott Laboratories (“Abbott”). But the subpoenas sought discovery concerning only a handful of drugs manufactured by Abbott and Dey -- and *147 drugs* manufactured by the Track I defendants.

The subpoenas are invasive and extraordinarily burdensome. They also run afoul of class action concepts because they require affirmative conduct on the part of companies that are absent class members and may never be parties to the action. The MANUAL FOR COMPLEX LITIGATION,

recognizes that discovery of absent class members should be permitted only to the extent necessary and should be carefully limited to ensure that it serves a legitimate purpose and is not used to harass either the class representatives or the class members. MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.41 at 400 (2004) (hereafter “MANUAL”). Defendants’ discovery campaign far exceeds what the defendants themselves have represented they need. There is no compelling need for the additional discovery defendants now demand.

Defendants’ subpoenas to the Tufts Health, Neighborhood Health, Fallon Community, and HPHC also represent an improper attempt to end run the Track I discovery cut-off. All defendants’ prior health plan subpoenas included requests for information concerning Dey and Abbott products. Dey and Abbott, like all other defendants, have had the opportunity to attend and cross-examine at all health plan depositions, and has had the benefit of that discovery. These subpoenas are not in furtherance of a specialized discovery need of Dey and Abbott. The discovery is for the benefit of all defendants – and particularly, given the number of drugs listed, the Track I defendants -- but advanced through the subterfuge of Track II defendant service.

For these reasons and others and set forth herein, Magistrate Bowler’s ruling rejecting defendants’ demand to take discovery of Tufts Health, Neighborhood Health, Fallon Community, and additional discovery of HPHC, should be affirmed.

II. FACTUAL BACKGROUND

In November 2005, Track II defendants Dey and Abbott issued subpoenas to four absent class member Massachusetts health plans. The information sought through these subpoenas was, for all intents and purposes identical (in some cases actually identical) to the information sought by subpoenas previously issued to health plans around the country by Track I defendants. Indeed, the defendants had already subpoenaed and sought depositions and documents

concerning precisely these categories of information from *over 40 health plans* accounting for 50 percent of the individuals covered by private health insurance in the United States, including the two largest health plans in Massachusetts.

The issue of the scope of permissible discovery of absent class members has been raised in this proceeding before. At each turn, the defendants have represented to the Court that each health plan from which they sought discovery was needed because it was a *critical part of a representative sample*, and that its discovery was limited to the sample group. For example:

- In their opposition to a motion by plaintiffs in December 2003 to limit non-party health plan discovery, the defendants represented that they had “compiled a list of forty Health Plans from among thousands of plans operating around the United States. The targeted Health Plans were intended to represent a cross-section of the industry, in terms of geographic diversity, size and type of plan.” *Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for a Protective Order*, dated January 9, 2004, at 6.
- At a status conference before Judge Saris at which this motion was raised, on March 8, 2004, defendants again represented that they were seeking discovery only of the health plans that comprised their sample, stating: “It’s not in our interest to be burdensome to that community. What we want to do is just develop enough information so we can present a sample” *Transcript of Status Conference*, at 49.
- Similarly, at a hearing before Magistrate Judge Bowler on a motion by health plan Health Net, Inc. for relief from defendants’ subpoena, defendants again represented that their health plan discovery was limited to the sample they had devised: “As your Honor is aware, Judge Saris allowed the defendants to proceed with discovery of a sample of health insurers in the industry. Health Net is a key part of that industry sample.” *Transcript of Hearing* dated January 27, 2005, at 7.
- In their written opposition to the recent motion of a group of six non-party health plans, including Blue Cross Blue Shield of Massachusetts, defendants justified their need for discovery because “The Plans were a critical part of the industry sample identified by defendants.” *Defendants’ Memorandum of Law in Opposition to Motion to Quash Subpoenas*, dated October 11, 2005, at 10.
- At the hearing before Magistrate Judge Bowler on the motion by the six non-party health plans, Defendants underscored their position that they were merely seeking to round out their representative sample, stating that the subpoenas “were part of the initial industry sample that defendants touted and were a particularly critical part of that sample because of their status as Blues plans. It’s a survey of precisely such plans that have been studied

that the plaintiffs in this case rely on for many of the assumptions that underlie their theories of liability and damages.” *Transcript of Hearing*, dated November 9, 2005.

Defendants consistently have represented that that their discovery of the absent class member health plans was limited to a necessary, targeted, representative sample they had devised. Based on these representations, the Court has permitted defendants to proceed.

Defendants previously have included in their representative sample BCBSMA and HPHC. These are the two largest Massachusetts absent class member health plans, with a combined membership of well over 50 percent of Massachusetts covered lives. BCBSMA, as the Court knows, has since become a named plaintiff and class representative in this proceeding and additional discovery is proceeding against it. HPHC required four depositions in addition to document and production.

The new round of discovery is inconsistent with the defendants’ prior representations to the Court and prior discovery activities. Tufts Health, Neighborhood Health, and Fallon Community were never held out by defendants as part of the necessary, targeted representative sample. And HPHC, of course, has already been subject to extensive discovery. Instead of issuing the discovery through the Track I defendants, however, as had consistently been done before, the subpoenas were issued through Track II defendants Dey and Abbott.

The subpoenas to Tufts Health and Neighborhood Health, however, were carbon copies of the subpoenas previously issued by the Track I defendants, and the subpoenas to Fallon Community and HPHC were close seconds. Moreover, the subpoenas seek information concerning only 24 of Dey and Abbott drugs. The number of drugs manufactured by the Track I defendants about which the subpoenas seek discovery is 147.

III. ARGUMENT

Rulings by a magistrate judge on non-dispositive matters such as discovery are entitled to deference unless “clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1). *United States v. Raddatz*, 447 U.S. 667, 673 (1980). Defendants have failed to put forward any basis for overturning Magistrate Bowler’s ruling, much less a basis that outweighs the “quite dramatic” burden the defendants purport to impose. Accordingly, Magistrate Bowler’s ruling should be affirmed.

A. Discovery of Absent Class Members Must Be Supported By Specific Need

The Massachusetts health plans currently subject to defendants’ discovery efforts are absent class members. Absent class members generally are not amenable to discovery as a matter of course. As the Supreme Court has reasoned, under the intent of Fed. R. Civ. P. 23, absent class members are “passive beneficiaries” to litigation, and are entitled to sit back and await results without undue involvement or bother. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552 (1974); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985) (“Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing there are safeguards provided for his protection.”). For this reason, the MANUAL recognizes that discovery of absent class members should be permitted only to the extent necessary and should be carefully limited to ensure that it serves a legitimate purpose and is not used to harass either the class representatives or the class members. MANUAL AT § 21.41 at 400 (2004).

The teaching of the MANUAL mirrors case law on the subject. First, courts should not permit parties to obtain discovery from absent class members unless they are able to “make a strong showing” of the reasons why the discovery was *absolutely necessary*. *Enterprise Wall*

Paper Mfg. Co. v. Bodman, 85 F.R.D. 325, 327 (S.D.N.Y. 1980). Second, courts allowing such discovery require that the party seeking discovery establish that the discovery sought is *unavailable elsewhere*. *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340-41 (7th Cir. 1974) (“The burden is heavy to justify asking questions by interrogatories, even heavier to justify depositions.”). Third, the court must ensure that the discovery will not subject absent class members to *undue harassment* or excessive taxing of their resources. *Robertson*, 67 F.R.D. at 700; *see also United States v. Trucking Employers, Inc.*, 72 F.R.D. 101, 104 (D.D.C. 1976) (string citations omitted); *see also Clark*, 501 F.2d at 340 (there must be a “showing that the information . . . is not designed ‘as a tactic to take undue advantage of the class members or as a stratagem to reduce the number of claimants.’”).

Defendants can make no showing that the discovery they seek is necessary at this stage. *Bodman*, 85 F.R.D. at 327. Defendants previously have subpoenaed health plans covering more than 50 percent of the covered lives in both the United States and Massachusetts. To secure discovery from these absent class members, defendants argued that discovery from each of the targeted health plans was necessary to round out the representative sample they had devised. But defendants have never before included three of the four newly subpoenaed health plans in their purported representative sample, and have already taken extensive discovery of the fourth. There is no basis to claim now that the sample of absent Massachusetts health plan class members requires enriching. By their own representations and actions, defendants have proven that further discovery of Massachusetts health plans is completely unwarranted.

Furthermore, defendants have failed to demonstrate that the information they seek has not been obtained from other sources. Indeed, because the requests to Tufts Health and Neighborhood Health are identical to requests sent to the representative group previously

subpoenaed, including Massachusetts absent class members BCBSMA and HPHC, defendants have already obtained the information sought or like information from other absent class members.

In issuing her ruling subject to the defendants' objection, Magistrate Bowler was presented precisely with the facts and arguments supporting plaintiffs' position that the discovery defendants now seek from Massachusetts absent class member health plans is not necessary, was already obtained elsewhere, and is unduly invasive and burdensome. Magistrate Bowler's discovery ruling is not clearly erroneous, and should be affirmed.

B. The Use By Defendants Of Track II Defendant Dey To Serve This Subpoena Is A Subterfuge And The Request Is Untimely Under the Track I Discovery Cutoff

Pursuant to CMO no. 13, issued by the Court on March 10, 2005, Track I discovery was required to be completed by August 31, 2005. During the period for Track I discovery, defendants crafted and undertook discovery of a representative sample of absent class member health plans. That discovery sought documents and testimony concerning drugs manufactured and marketed by both Track I and Track II defendants. In addition, Track I and Track II defendants' counsel had access to all documents, and were invited to attend and cross-examine at all depositions.

Through this latest round of discovery, defendants' seek to continue the extraordinary campaign of discovery undertaken during the Track I phase of discovery against absent class members. To avoid the bar of the Track I discovery cutoff, however, they have proceeded through Track II defendant Dey.

The proof of defendants' subterfuge is ample. First, the subpoenas issued to Tufts Health and Neighborhood Health are substantively identical to the subpoenas issued to the health plans

by the Track I defendants. There is nothing in the subpoenas reflecting unique discovery needs of Dey and Abbott.

Second, the subpoenas issued to these absent class member health plans mark the first health plan subpoenas issued by any defendant other than a Track I defendant. This campaign has been orchestrated entirely by the Track I defendants.

Third, the subpoenas seek extensive discovery with respect to Track I defendant drugs. Indeed, nearly half of the drugs about which inquiry is made – 147 drugs – are Track I defendant products. The Court should not abide the efforts by Track I defendants to end-run the deadlines set forth in CMO no. 13 by permitting them to continue to conduct their discovery through a Track II defendant.

In holding the subpoenas to be invalid, Magistrate Bowler found that defendants had failed to present a legitimate discovery need to overcome the “dramatic” burden the discovery placed upon the Massachusetts health plans. Magistrate Bowler’s ruling should be affirmed.

C. The Subpoenas Issued to Fallon Community and HPHC Are Invalid Because They Were Issued In Violation of CMO no. 10

The subpoena to Fallon Health is dated November 21, 2005 and called for the production of documents and deposition testimony on December 2, 2005. Dey thus provided only *11 days notice* of the deposition. The subpoena to HPHC is dated November 23, 2005 and called for the production of documents and deposition testimony on December 2, 2005. Abbott thus provided only *9 days notice* of the deposition.

Case Management Order No. 10 entered March 24, 2004, at ¶ 7, states:

A party shall provide a “three week deposition notice” under which such party provides *at least 21 days notice* for a proposed deposition. (Emphasis added).

Because Dey and Abbott failed to provide at least 21 days notice for the proposed depositions, as is required by this Court's case management order, their notices of deposition of Fallon Health and HPHC are invalid.

Abbott's notice of deposition to HPHC should be stricken for the additional reason that defendants had already subpoenaed HPHC once before. Specifically, in a subpoena dated November 19, 2003, the Track I defendants sought production of 26 categories of documents and testimony from HPHC. That subpoena resulted in the production of voluminous documents and four depositions of HPHC employees. Abbott was entitled to participate in those depositions and obtained discovery from them specific to Abbott. In particular, the subpoena called for production of documents relating to *31 drugs manufactured by Abbott*.

Notably, the November 19, 2003 subpoena called for the deposition of HPHC to take place on December 10, 2005 – exactly *21 days* from the date of the subpoena.

During the hearing on the motions underlying defendants' objections, Magistrate Bowler considered and rejected defendants' argument for the validity of their Massachusetts health plan subpoenas notwithstanding their failure to comply with CMO No. 10. Magistrate Bowler's ruling should be affirmed.

IV. CONCLUSION

"If discovery from absent members of the class is permissible at all, *it should be sharply limited and allowed only on a strong showing of justification.*" MANUAL, § 30.232 at 232 (quoting 8 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 2171 (2d ed. 1994)) (emphasis added). The subpoenas that defendants have served on Massachusetts health plans are far from "sharply limited." Moreover, defendants have not demonstrated a "strong showing" justifying the discovery that they seek. The subpoenas are unnecessary; seek information that

defendants already have obtained – they already have their representative sample, *both nationally and from Massachusetts*; and are burdensome and harassing. In addition, the discovery is untimely because it is clearly undertaken at the behest of Track I defendants in order to avoid the Track I discovery cutoff. It is also invalid as issued in violation of CMO no. 10.

Respectfully submitted,

By /s/ David Nalven

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Dated: March 8, 2006

CERTIFICATE OF SERVICE

Docket No. MDL 1456

I, David S. Nalven, hereby certify that I am one of plaintiffs' attorneys and that, on March 8, 2006, I caused copies of this pleading to be served via Lexis/Nexis File Serve on all counsel of record.

/s/ David S. Nalven

Dated: March 8, 2006

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Docket No. 01-12257-PBS

CITIZENS FOR CONSUMER JUSTICE, ET AL.

Plaintiffs	.
	.
v.	.
	.
ABBOTT LABORATORIES, et al	.
Defendants	.
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MARIANNE B. BOWLER
UNITED STATES MAGISTRATE JUDGE
HELD ON FEBRUARY 2, 2006

APPEARANCES:

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For AstraZeneca Pharm.: Nicholas Theodorou, Esquire, Foley Hoag LLP, 155 Seaport Boulevard, Seaport World Trade Center West, Boston, MA 02210, (617) 832-1163.

For Dey, Inc.: Chris Palermo, Esquire, Kelley Drye & Warren LLP, 101 Park Avenue, New York, NY 10178, (212) 808-7800.

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For Empire Blue Cross Blue Shield: Theodore Hess-Mahan, Esquire, Shapiro Haber & Urmey, LLP, 53 State Street, Boston, MA 02108, (617) 439-3939.

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For Neighborhood Health Plan: Susan Banning, Esquire, Hemenway & Barnes, 60 State Street, Boston, MA 02109, (617) 557-9701.

For Fallon Community Health Plan: William Saturley, Esquire, Nelson, Kinder, Mosseau & Saturley, PC, 99 Middle Street, Manchester, NH 03101-1510, (603) 606-5005.

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P R O C E E D I N G S

2 (Court called into session)

3 THE CLERK: The Honorable Marianne D. Bowler
4 presiding. Today is February 2, 2006. The case of Citizens
5 for Consume, et al v. Abbott Labs, et al, Civil Action
6 No. 01-12257 will now be heard. Will counsel please identify
7 themselves for the record.

8 MR. NALVEN: Your Honor, I'm David Nalven from Hagens
9 Berman in Boston representing the plaintiffs.

10 THE COURT: Thank you.

11 MR. CHRISTOFFERSON: Good morning, Your Honor, Eric
12 Christofferson from Ropes and Gray representing Schering-Plough
13 Warrick Pharmaceuticals Corporation.

14 THE COURT: Thank you.

15 MR. MANGI: Good morning, Your Honor, Adel Mangi from
16 Patterson, Belknap, Webb & Tyler for Johnson & Johnson.

17 THE COURT: Thank you.

18 MR. THEODOROU: Good morning, Your Honor, Nicholas
19 Theodorou representing AstraZeneca Pharmaceuticals.

20 MR. PALERMO: Good morning, Your Honor, Chris Palermo
21 from Kelley Drye & Warren representing Dey, Inc.

22 THE COURT: Thank you.

23 MS. GEISLER: Good morning. Carol Geisler from Jones
24 Day representing Abbott Laboratories.

25 THE COURT: All right. Counsel have received the

1 notice, and I've just received from Mr. Nalven the order in
2 which he would like to proceed here and--

3 MR. NALVEN: Yes, Your Honor, I shared that by
4 telephone with all counsel previously. I received no
5 objection. No joinder but no objection and so I provided it to
6 the Court this morning.

7 THE COURT: Is there any objection?

8 MR. THEODOROU: Well, I don't really know which the
9 order is, but I assume that we're--

10 THE COURT: Can you show Mr. Theodorou?

11 MR. THEODOROU: Hopefully I'm first.

12 MR. MANGI: I have a copy here.

13 THE COURT: I could say something, Mr. Theodorou, but
14 I won't.

15 MR. NALVEN: Your Honor, as I explained to Mr. Duffy,
16 the two matters at the bottom of the list I believe are off the
17 calendar because they've been resolved and one of those is
18 Mr. Theodorou's.

19 MR. THEODOROU: Yes, Your Honor--

20 THE COURT: Which--

21 MR. THEODOROU: --1894, the motion to compel
22 production of documents from the Union of Operating Engineers.
23 Judge Saris had argument on that on Friday. We have submitted
24 orders. Plaintiffs have submitted their own proposed order and
25 it's before Judge Saris.

1 THE COURT: And would you like to be excused,
2 Mr. Theodorou?

3 MR. THEODOROU: If I may?

4 THE COURT: You may.

5 MR. THEODOROU: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 MR. NALVEN: Your Honor, in addition, plaintiffs and
8 defendants yesterday evening resolved motion 1794. That's the
9 motion to compel production of IMS data and reports by the
10 Track 1 defendants. I reached an agreement with
11 Mr. Christofferson last night.

12 THE COURT: All right, so the motion--

13 MR. CHRISTOFFERSON: That's right, Your Honor.

14 THE COURT: --should be withdrawn by agreement of
15 counsel?

16 MR. NALVEN: Yes, ma'am.

17 MR. CHRISTOFFERSON: Yes, Your Honor.

18 THE COURT: Anything but ma'am. And would you like
19 to be excused, Mr. Christofferson?

20 MR. CHRISTOFFERSON: Respectfully, no, Your Honor, we
21 have another motion on.

22 THE COURT: You have other matters, all right. All
23 right, then we will proceed in the order listed by Mr. Nalven,
24 starting with docket entry no. 1682.

25 MR. HESS-MAHAN: Good morning, Your Honor, my name is

1 Theodore Hess-Mahan from the law firm of Shapiro Haber & Urmey,
2 and I represent Empire Blue Cross Blue Shield, which is the
3 movant on the motion for protective order, 1682.

4 THE COURT: I'll hear you.

5 MR. HESS-MAHAN: Okay. Thank you, Your Honor. This
6 is a very simple, straightforward motion, Your Honor. Just to
7 give you some background, this is not the first time that my
8 client's been subpoenaed by the defendants in this case. They
9 were served in April of 2004 with a 26 document request and
10 request for deposition topics which over the course of several
11 months were negotiated and narrowed somewhat but resulted in
12 Empire producing close to 30,000 pages of documents and two
13 deposition witnesses for full day depositions at which they
14 testified in large part on the very areas which defendants are
15 now pressing to have additional depositions; that is on
16 physician administered drugs. And the situation we find
17 ourselves in now since the class certification order is that we
18 are no longer really a member of the class. As a non-party
19 here, it's a different burden. It's whether it's unduly
20 burdensome. I submit respectfully, Your Honor, that enough is
21 enough. We've produced 30,000 pages of documents. We produced
22 two witnesses for two days of depositions. They've testified
23 at length as the reply memo and the attached deposition
24 transcripts, Exhibits D and E, show. At this point there
25 really isn't much more that we can provide. We've responded to

1 the document request, given them additional documents in
2 response to a subsequent subpoena. But at this point in the
3 game, there really isn't a reason why they need to take a
4 deposition witness in advance. It would be large and
5 duplicative discovery. There's nothing new that they're going
6 to discover here. They've done the discovery on Empire's use
7 or non-use of AWP and how they handled physician administered
8 drugs. At this point, Your Honor, we'd be just asking to be
9 relieved of the burden of having to come back with additional
10 witnesses who are simply going to give the same testimony.

11 THE COURT: I'll hear you.

12 MR. NALVEN: Thank you, Your Honor. Respectfully,
13 there really can be no dispute first that this discovery is
14 still relevant. The discovery here clearly goes to the heart
15 of the case. It's third party payers, like Empire, that the
16 plaintiffs claim were duped by the alleged AWP scheme and the
17 practices and knowledge of one of the biggest insurers in this
18 country are surely relevant to the claims and defenses in this
19 litigation. The fact that Empire is based in New York and not
20 Massachusetts is of no moment. Empire says that the discovery
21 is irrelevant because the classes are limited to Massachusetts,
22 but Judge Saris' class certification order, which was just
23 issued on Monday, defines the classes to include third party
24 payers who made purchases of drugs in Massachusetts. And
25 Empire has admitted in its papers that at least it has made on

1 at least a few occasions payments to prescribers in
2 Massachusetts. So they very likely are, in fact, a class
3 member. But even if Empire's somehow not a class member--

4 THE COURT: I mean a few occasions, what does that
5 mean in terms of raw numbers?

6 MR. NALVEN: Your Honor, in their reply paper they
7 mention that they have some members who lived or received
8 treatment in Massachusetts. We haven't, there's no, you know,
9 significant record on what their contacts are, but we would
10 submit that it's very likely that they have paid prescribers in
11 Massachusetts. For example, a New York resident who needs to
12 go to Mass General to receive treatment is probably something
13 that happens quite often. But even if somehow they're not a
14 member of this particular class, it's still very relevant. The
15 plaintiffs expert, Dr. Hartman, relies on data that he received
16 from Blue Cross Blue Shield of Kansas City, a Missouri third
17 party payer, for some of his analysis regarding the so-called
18 Massachusetts classes. I highly doubt that the plaintiffs in
19 this case would say that the actions and knowledge of a third
20 party payer in New York are irrelevant to the so-called
21 nationwide AWP scheme. And Your Honor has already granted
22 discovery similar to that that's being requested.

23 With respect to the burden here, Your Honor, I think
24 that it's also not very burdensome at all. With respect to
25 documents that were requested in the subpoena, Empire has

1 already produced those documents, so all we're talking about
2 is a single 30(b)(6) deposition.

3 THE COURT: It can be done in one day?

4 MR. NALVEN: I believe so. They have already
5 identified two people to speak to the narrow focused topics
6 that we've negotiated. It's not a very large, you know, it's
7 not a very expansive set of topics that we've asked for and,
8 you know, it seems to us that it could be done very quickly
9 depending on the schedules of course of the witnesses. We are
10 willing to travel to them. They don't have to travel anywhere,
11 and the discovery, I just want to add, Your Honor, the
12 discovery that Mr. Hess-Mahan referred to regarding what was
13 done earlier was simply not on the specific topics that we've
14 identified here. They're very narrow, focused topics and the
15 witnesses before were not knowledgeable about these particular
16 specific narrowed topics. And so we just don't see that Empire
17 has identified that there's a significant burden here and, you
18 know, we just want to ask them some narrow focused questions
19 about documents they've already produced. It doesn't seem to
20 us that it's going to be a long or a taxing deposition.

21 MR. HESS-MAHAN: May I just briefly be heard? As to
22 the number of subscribers that we have that are treated in
23 Massachusetts these are purely incidental. These are folks who
24 lived in New York, moved to Massachusetts. There maybe some
25 who in fact got treatment in Massachusetts but because of the

1 geographic territory we're talking about, which is lower state
2 New York, we're not talking about a whole lot of people. It's
3 going to be a very, very few. And there certainly wasn't any
4 sort of, you know, there wasn't no intention to cover people
5 who are now within the class of patients who are covered.

6 With respect to testimony that was already given, I
7 just direct the Court's attention to page three of the reply
8 memo and the citations there to the record. There has already
9 been, and again the subpoena here is specifically on oncology
10 drugs. That's exactly what the two witnesses who have already
11 testified in full day depositions have testified regarding.
12 They gave the knowledge that was available to the company
13 Empire at the time, and all we'd really be doing is rehashing
14 what's already been discussed and basically, you know,
15 authenticating documents, which again, the burden compared to -
16 and we're perfectly willing to authenticate those documents.
17 There's no dispute from us.

18 THE COURT: Well, it doesn't seem to me that's it's
19 overly burdensome. I'll limit it to one day. The two people
20 have been identified. They're willing to travel to you. I
21 don't think that's unreasonable.

22 MR. NALVEN: Thank you, Your Honor.

23 THE COURT: All right. So the motion to quash is
24 denied but the deposition is limited to one day.

25 MR. HESS-MAHAN: Thank you.

1 THE COURT: All right, moving on to docket entry
2 number 1770.

3 MR. MANGI: Thank you, Your Honor, Adel Mangi from
4 Patterson and Belknap on behalf of defendants. The subpoena at
5 issue here, Your Honor, was issued on April 9, 2004. United,
6 the recipient of the subpoena, is a particularly critical part
7 of defendants industry sample because of their status as a
8 major national insurer. That subpoena was issued almost two
9 years ago now, but to date United has made only a limited
10 production of documents. It's produced some documents from a
11 prior litigation production and it's produced some contracts.
12 United has refused to produce documents responsive to
13 defendants narrowed production demands and United has refused
14 to produce any witnesses for deposition. The only arguments
15 that United has put forward to excuse their non-compliance with
16 the subpoena are arguments that Your Honor has previously ruled
17 on, not in reference to one or two health plans but in relation
18 to 10 health plans now.

19 Most recently in November of 2005 Your Honor heard a
20 motion to compel against six Blue Cross Blue Shield plans and
21 the arguments there were identical to the issues raised here.
22 The documents sought were identical to the documents sought
23 here and the deposition focus are slightly narrower for United.
24 Previously in January of '05 Your Honor ordered discovery to
25 proceed against Health Net which was substantially broader than

1 the discovery sought here because that also encompassed self
2 administered drugs whereas the focus is now purely on physician
3 administered drugs. And of course there were previous motions,
4 in November of '04 against Aetna, Cigna, Humana and Judge Saris
5 also ordered discovery to proceed against health plans in April
6 of 2004.

7 In sum, Your Honor, what we have here is a situation
8 where for almost two years United has engaged in every possible
9 effort to delay and stall this discovery and is now seeking to
10 be rewarded for that by being excused from production.
11 Defendants ask that United be held in the same standard as all
12 the other health plans that have been subpoenaed in this
13 litigation, ordered to make a good faith production to the same
14 narrow demands we've addressed to other health plans. As to
15 the substance of the request, we've previously argued those
16 before Your Honor so I won't take the Court's time with them
17 again, but I'm available to respond to any specific points my
18 learned friend Mr. Prame may raise for United.

19 THE COURT: All right. I'll hear you.

20 MR. PRAME: Thank you, Your Honor, Michael Prame from
21 Groom Law Group in Washington on behalf of United Health Care.
22 United submits there are four reasons why the Court should deny
23 the motion to compel. I believe my colleague underestimates or
24 understates United's efforts to comply with the subpoena. They
25 have not been recalcitrant. In 2004 United spent over 250

1 staff hours identifying, collecting and producing over 25,000
2 pages of material pursuant to the request that the defendants
3 were making at that time. The second reason why the motion
4 should be denied, the additional discovery that the defendants
5 are now seeking United submits would be unduly burdensome in
6 that it would take thousands of hours over a six month period
7 to respond to those requests to the extent, at least in
8 particular one item it may not even be possible to do that.
9 The discovery sought also as been discussed earlier has not be
10 tailored to the classes that have been certified by the Court.
11 Third, United submits the defendants have already obtained the
12 sample that the Court authorized them to get. They have taken
13 the depositions and obtained discovery from over 50% of the
14 insured lives in the United States and health plans and
15 insurers covering more than 50% of the classes that were
16 certified by the Court. And fourth, the motion to compel is
17 not timely.

18 To focus a little bit upon what happened in 2004,
19 United did receive the subpoena in April of 2004. They filed
20 their objections and immediately turned around and started
21 discussing with counsel what it was that defendants were
22 seeking from them. That was a three-month process, Your Honor.
23 In August of 2004 there was an agreement reached as to what we
24 produce for documents. United turned around those documents,
25 spent 250 hours over the next two months gathering,

1 identifying, collecting those documents from sites nationwide.
2 Many of these documents were archived off site. They pulled
3 those back. Others were in computer archives, pulled those
4 back. United completed its document production in November of
5 2004. As I said, all tolled it was 250 staff hours, 25,000
6 pages of material and outside legal fees in connection with
7 negotiating the scope of the subpoena, reviewing documents for
8 production hit the six figure mark. United completes its
9 production in November of 2004. It's not until nearly June of
10 2005 defendants come back and say we'd really like more, May
11 27th. We negotiated with them again for another month and a
12 half. And after that month and a half United simply said it's
13 too burdensome. Now let me speak to that burden. One of the
14 things that they request is for United to produce its fee
15 schedules for the period 1997 to 2003. There are
16 70,000 fee schedules for that period. Those fee schedules in
17 United's computer--

18 THE COURT: Isn't this available though in electronic
19 format?

20 MR. PRAME: Comprised of billions of rows of computer
21 code. United can't even say that they have the system band
22 with to download that type of information. To the extent that
23 they do, they estimate it's going to take 20 employees full
24 time for four months to download that, to get that information.
25 We had offered during the negotiation to do a representative

1 sample of fee schedules and it was rejected.

2 THE COURT: Why isn't that a reasonable place to
3 start?

4 MR. MANGI: Your Honor, on the specific issue of fee
5 schedules defendants have had some experience dealing with fee
6 schedule productions from health plans to date. Your Honor has
7 ordered that production many times and we've received it from a
8 number of health plans. In no case to date has the production
9 of fee schedules proved a burden because as Your Honor
10 indicated it's a simple electronic download. They're not even
11 field issues as there can sometimes be with claims data. Now
12 insofar as there are unique issues pertaining to United's fee
13 schedule production we have asked for a specific identification
14 of what the problems are so that we can work with United to
15 find a reasonable solution. We have received no technical
16 specifications as to where this problem is coming up that makes
17 United unique. We would submit that if United's obligation to
18 produce documents in response to the subpoena is made clear we
19 are then willing to work with United. If it's a simple
20 technical roadblock that we can resolve we're willing to do
21 that. If it cannot and we need to sample fee schedules then
22 we'll do that.

23 THE COURT: Well, I think you have to at least share
24 with your brother the source of the technical problem. If it's
25 been feasible for everyone else, I don't know why it's such a

1 problem.

2 MR. PRAME: Yeah, I mean, we outlined in our papers,
3 Your Honor. We've discussed with them the issue. Even--

4 THE COURT: Well, your brother's just telling me that
5 he doesn't know.

6 MR. PRAME: With all do respect, Your Honor, we have
7 been dealing with a separate attorney at that law firm until
8 August of this year. We had these discussions with her.
9 Mr. Mangi, we've had more recent discussions with in September.
10 We started over from square one with Mr. Mangi in September.
11 We had told them--

12 THE COURT: Well, apparently he is not satisfied with
13 your explanation in terms of the technical problems that make
14 your company unique from all the others.

15 MR. PRAME: And we would be happy to continue that
16 discussion. We've outlined in our paper that it's billions of
17 lines of computer code. Even in the letter that we sent
18 proposing the sample, we said we'll give you 10 contracts from
19 Massachusetts for each year, 10 fee schedules and for those fee
20 schedules you identify the drugs that you want and we'll go
21 back and get them.

22 THE COURT: And how many fee schedules are there on
23 average per year? I mean, I'd like to know what the - if you
24 say 10 what portion of the sample that is?

25 MR. PRAME: Yeah, a couple of concepts, Your Honor.

1 The fee schedule just doesn't focus on drugs. The fee
2 schedule with providers is every type of fee for service that
3 they provide.

4 THE COURT: Sure, I realize that.

5 MR. PRAME: The drug, as I understand it, the drug
6 components of those fee schedules get updated twice a year.

7 THE COURT: But you didn't answer my question. If
8 you say we're willing to provide 10, well if 10 of 50, that's
9 significant, but if it's 10 of 200 it's perhaps not as
10 significant. So I'm trying to get a sense of what it is--

11 MR. PRAME: Yeah.

12 THE COURT: --you're willing to offer.

13 MR. PRAME: Yeah. We had, as I said there are
14 70,000--

15 THE COURT: Do you know the answer to my question?

16 MR. PRAME: There are 70,000 fee schedules, Your
17 Honor from the--

18 THE COURT: For the time periods?

19 MR. PRAME: --`97 to 2003. We had--

20 THE COURT: 70,000 and you telling me you would
21 provide 10?

22 MR. PRAME: No, we would provide 70, we've done 10
23 for each year for the Boston area, and what that was being
24 projected was 80 hours worth of work over two to three week
25 period to do that.

1 THE COURT: Well, I think 70 out of 70,000 is
2 probably not statistically significant. Mr. Mangi?

3 MR. MANGI: Thank you, Your Honor. If I may address
4 the specific issue of fee schedules and then I'll address the
5 other issues if Your Honor pleases. It sounds to me, first of
6 all in relation to communications United has had with Collins
7 at Patterson Belknap, I've reviewed all those files and all the
8 logs of phone conversations and was involved in some. It
9 appears to me that the source of United's problem insofar has
10 be able to--

11 THE COURT: You can be seated while your brother
12 argues.

13 MR. PRAME: Thank you.

14 MR. MANGI: --insofar as I've been able to ascertain
15 to date pertains to fees for physician services that have no
16 relation to drug administration. We're not interested in those
17 fees. We've made that clear to United as to other plans.
18 We're interested in the fee schedules pertaining to drugs and
19 in the fee schedules pertaining to services incident to drug
20 administration. There are a number of relatively simple ways
21 to pull the services incident to drug administration. In some
22 claim systems they can be pulled by reference to the same
23 overarching claims number that pertain to drugs. In others we
24 have and can provide again a list of administration specific
25 codes. To put this in context, Your Honor, the fee schedule

1 production to date no third party health plan has even asked
2 for any cost from fee schedule production to be reimbursed
3 because they've proved nominal. And again, I would submit that
4 once the obligation to United to produce is made clear any
5 issues can be resolved expeditiously.

6 If I may respond briefly to a couple of other points
7 that my learned friend made. In relation to productions to
8 date and the issue of burden, the mere volume of pages that
9 have been produced says nothing as to the nature of the
10 documents that have been produced. To put that issue in
11 context, United has not produced any documents reflecting its
12 knowledge of critical issues such as margin, the existence of
13 margin, expectation of margin, which is at the core of
14 plaintiffs' case. In relation to the burden of producing those
15 additional documents we suspect it's nominal. In fact in a
16 letter from July United told us that they had already
17 identified the documents that they needed to produce as to
18 margin. They just haven't produced them.

19 As to the issue of our not having focused purely on
20 United's Massachusetts operations, well again, that's a simple
21 point. There is no claim in this case that there was a
22 Massachusetts specific fraud. The claim is of a nationwide
23 fraud. It so happens that the class that's been certified in
24 this context is Massachusetts specific, but proving or
25 disproving it and plaintiffs' theories is a consequence of the

1 knowledge of the industry as a whole. So United's knowledge
2 on these issues is absolutely critical.

3 And finally in terms of the fact that we subpoenaed
4 other plans in addition to United is the identical argument
5 made by the group of Blues plans saying, well, others have
6 produced so we shouldn't have to. Well, Your Honor, this is a
7 bit of chicken and egg. You'll recall the Blues plan said,
8 well, United has been subpoenaed so we shouldn't have to
9 produce and here we see United making the same argument.
10 They're all critical parts of the same industry sample. Some
11 are major players. Some are smaller players. United's
12 subpoena's been outstanding for some two years now and we
13 submit they should be ordered to produce.

14 MR. PRAME: May I be heard, Your Honor?

15 THE COURT: You may.

16 MR. PRAME: A couple of additional points, and I want
17 to make sure that it's clear, we were not posing to produce our
18 entire fee schedule. What I was talking about was producing
19 the schedules as they related to drugs and those numbers that I
20 was referencing was specifically related to the drug issue. I
21 think the inference that we have been withholding documents is
22 misleading. We have produced every single document that they
23 requested back and we negotiated back in 2004, every single
24 one. They came back in June 2005 and said, notwithstanding
25 that we want more. So we have produced everything that had

1 been agreed to, but our objection on burden is not limited to
2 the fee schedules. We have the same issue for claims data.
3 For claims data we've told them on multiple occasions, we've
4 written them series of letters of how many hours it's going to
5 take and how long it's going to take. The current request is
6 estimated 450 hours over a three to six month period to produce
7 data for Arizona and Massachusetts for 1997 to 2003.

8 THE COURT: Well, I'm going to grant the motion, and
9 I suggest that you sit down and see if there is some way that
10 by providing them some technical information they may be able
11 to expedite the process for you. Agreeable?

12 MR. MANGI: Thank you, Your Honor.

13 THE COURT: All right.

14 MR. PRAME: With all do respect, Your Honor, I assume
15 that the points that we have made in our briefs would be within
16 the record and the reasons why you're denying the motion would
17 include those arguments that we have made on other points.

18 THE COURT: So noted.

19 MR. PRAME: Thank you, Your Honor.

20 THE COURT: All right, moving on. Docket entry
21 number 1907.

22 MR. NALVEN: Your Honor, before you you have six
23 motions, the following six motions listed on the argument list
24 that I provided to the Court this morning. All of these six
25 motions deal with subpoenas that were sent to four--

1 THE COURT: Right.

2 MR. NALVEN: --Massachusetts's third party payers,
3 Tufts, Neighborhood Health Plan, Fallon and Harvard Pilgrim
4 Community Health Plan. Because all of these, because the
5 protective order motions and the motions to quash address the
6 same subpoenas I would recommend to the Court that the Court
7 consider all of these motions together. I can address on
8 behalf of plaintiffs the arguments for plaintiffs' protective
9 order motion. I would recommend to the Court that the Court
10 include in this global argument the arguments of third party
11 payer counsel who are here today and are prepared to step up--

12 THE COURT: All right.

13 MR. NALVEN: --and perhaps it would be useful for you
14 to have before you all counsel at one time.

15 THE COURT: I agree.

16 (Pause)

17 UNIDENTIFIED: Would the Court like counsel for the
18 third party payers to identify themselves?

19 THE COURT: I certainly would.

20 MS. JOSEPHSON: Good morning, Your Honor, I'm Anne
21 Josephson from Kotin, Crabtree & Strong. I represent Tufts
22 Associated Health Plan.

23 THE COURT: Thank you.

24 MS. JOSEPHSON: Thank you.

25 MS. BANNING: Good morning, Your Honor, my name is

1 Susan Banning from Hemenway & Barnes. I represent
2 Neighborhood Health Plan.

3 THE COURT: Thank you.

4 MR. SATURLEY: Good morning, Your Honor, William
5 Saturley from Nelson, Kinder, Mosseau & Saturley. And in this
6 matter I speak for Fallon Community Health Plan.

7 THE COURT: Thank you very much.

8 MR. SATURLEY: Thank you.

9 MR. NALVEN: Your Honor, now on behalf of plaintiffs
10 I will address together, because the arguments are almost
11 identical, motions 1907 and 1909. 1907 is directed to the
12 subpoenas issued to Tufts and Neighborhood Health Plan, and
13 1909 is directed to the subpoenas issued to Fallon and Harvard
14 Pilgrim. The issue of discovery of non-parties, that is absent
15 class members, is an issue that the Court has dealt with on
16 several occasions before. What's critical to understand is
17 that when the issue was first raised with Judge Saris, Judge
18 Saris understood and expressly acknowledged that discovery of
19 absent class members was generally frowned upon absent a
20 showing of a specific need. The defendants argued to Judge
21 Saris and have argued to you repeatedly that the reason that
22 they needed discovery of absent class members is because they
23 had constructed a representative sample of third party payers
24 from around the country and that they needed the specific third
25 party payers whom they had subpoenaed and they took the

1 depositions of over 40 third party payers - they're seeking as
2 well - the two that you previously saw on the basis that they
3 had constructed this representative sample. They argued and
4 we've set forth in our papers on four or five occasions when
5 they represented to Judge Saris and to you that the reason that
6 they needed the specific discovery of an identified health plan
7 provider was because it was a key part of that representative
8 sample.

9 Defendants have already taken over 40 health plans
10 covering over 50% of the covered lives in the United States.
11 It really begs the question at this point now that they have
12 obtained all of the health plans discovery that constituted
13 their representative sample why are they back here now seeking
14 further discovery of four Massachusetts health plans? Did the
15 defendants have a representative sample in the first place as
16 they have represented to the Court, and if they did, why is it
17 that at this point they require more? The defendants respond
18 to that argument which is set forth in our papers by saying in
19 essence the world has changed since they constructed their
20 representative sample. What they say to the Court is Judge
21 Saris has certified two specific Massachusetts only classes and
22 so that as a result now they need to drill down into
23 Massachusetts third party payers. You did hear from Mr. Mangi
24 just one moment ago that the proof with respect to the
25 Massachusetts class will be demonstrated by the knowledge of

1 the industry as a whole which is the reason that they continue
2 to pursue discovery of third party payers nationally. So that
3 again begs the question why select four more Massachusetts
4 third party payers? Let me note, Your Honor, that they have
5 already taken two depositions, I'm sorry, three depositions of
6 Blue Cross Blue Shield of Massachusetts which were granted by
7 Your Honor in November. And they have also already taken
8 discovery and four depositions from Harvard Pilgrim Community
9 Health Plan. These two Health Plans together comprise more
10 than 50% of the covered lives in Massachusetts. Your Honor, I
11 work here in Massachusetts, you work here in Massachusetts.
12 They have discovery from Blue Cross Blue Shield of
13 Massachusetts, Harvard Pilgrim. They are now seeking discovery
14 from Tufts, Fallon, Neighborhood Health and more discovery from
15 Harvard Pilgrim. Are you aware of any health plan providers
16 other than those five in Massachusetts? This is not a
17 representative sample even of Massachusetts, even if it were
18 needed, this is every covered life in Massachusetts. This
19 isn't a representative sample, Your Honor. This is a census
20 that they are seeking. You know, the Nielson Company does
21 their sample of all American television watchers with 400
22 families. It seems to defy credulity that the defendants
23 really need discovery of virtually every covered life in
24 Massachusetts.

25 Three more very brief points, Your Honor. Number

1 one, the discovery of third party payers has been undertaken
2 entirely through the course of this proceeding through the
3 Track 1 defendants, and it was the Track 1 defendants who had
4 represented to you that the defendants had constructed a
5 representative sample. As Your Honor knows Track 1 discovery
6 concluded at the end of August. So the subpoenas that were
7 sent to my brothers' and sisters' clients were sent by Track 2
8 defendants. Track 2 defendants after all were permitted to
9 take discovery until December 3rd. But it's clear from the
10 subpoenas and from their attachments and from the content of
11 their attachments that these subpoenas, that the Track 2
12 defendants are acting no more as agents for the Track 1
13 defendants in this discovery effort and it's utterly a
14 subterfuge to permit the Track 1 defendants to extend their
15 discovery campaign against absent class members. What is the
16 proof of that? The attachment to the subpoena is virtually
17 identical to the attachments to the subpoenas sent by the Track
18 1 defendants. What is the other proof of that? There are a
19 list of drugs that the companies want information concerning on
20 those subpoenas. Among those lists are 147 drugs that were
21 manufactured by the Track 1 defendants. They, one of the
22 manufacturers sending the subpoenas, had submitted, the
23 subpoena that they had submitted had only five day drugs on it
24 but 147 Track 1 drugs.

25 And again, Your Honor, two more very small points.

1 Number one, as Your Honor knows there is a CMO in place in
2 this case which requires 21 days notice. The subpoenas that
3 were sent to Fallon and to Harvard Community Health Plan were
4 sent on I think something like 11 and nine days notice
5 respectfully, respectively. Why is that? Well because they
6 were sent too close to the December 3rd Track 2 cutoff in order
7 to provide sufficient notice. On that ground alone they should
8 be stricken. I want to add as well one small point. In one of
9 Dey's responses it indicates that while my brothers' and
10 sisters' clients before you today are not cooperating with the
11 subpoena that Harvard Pilgrim Community Health Plan is
12 complying with the subpoena and subsequent to Dey's submission
13 of that representation Harvard Community did submit to the
14 parties, and I provided it to the Court yesterday an extensive
15 objection submitted by Harvard Pilgrim. So on those grounds,
16 Your Honor, plaintiffs submit that these subpoenas should be
17 quashed, that the protective order should be granted and that
18 no further discovery is needed or should be allowed against the
19 health plans in Massachusetts.

20 THE COURT: All right. Responding?

21 MR. PALERMO: Good morning, Your Honor, Chris Palermo
22 on behalf of Dey. Your Honor, as counsel for plaintiffs has
23 acknowledged, the issue of discovery against the absent class
24 members has already been considered by the Court and the Court
25 has already permitted on two occasions absent class member

1 discovery. The issue is relevance--

2 THE COURT: The issue is why were they so late?

3 MR. PALERMO: In terms of--

4 THE COURT: The 21 days?

5 MR. PALERMO: Well, Your Honor, I believe CMO 10
6 permits, and I think it's CMO 10, permits notice to third party
7 payers on seven days notice, Your Honor, and I believe that
8 that's--

9 THE COURT: What's your position on that?

10 MR. NALVEN: Your Honor, that's flatly incorrect.
11 We've attached the CMO to our papers and we've explained why
12 that argument is incorrect.

13 THE COURT: Point it out to me then.

14 MR. PALERMO: Your Honor, I'll have to look in our
15 papers. It was in our opposition to the plaintiffs' motion.

16 THE COURT: Well, do you have it in front of you?

17 MR. PALERMO: I'll have to get it, Your Honor. Just
18 one moment.

19 (Pause)

20 MR. PALERMO: I apologize, Your Honor.

21 (Pause)

22 THE COURT: Do you have it, Mr. Nalven, where you
23 could--

24 MR. PALERMO: Your Honor, it's Exhibits G and H to
25 the proposition to the plaintiffs' motion, Your Honor.

1 THE COURT: Let's see if I can pull it up
2 electronically.

3 (Pause)

4 MR. PALERMO: Your Honor, on and I'm sorry, Your
5 Honor, at September 27, 2004 Exhibit F and, Your Honor, the
6 Court had ruled that defendants could notice third party payer
7 depositions on seven days notice provided that the defendants
8 did not notice more than 10 depositions in any one week.

9 MR. NALVEN: Your Honor, Your Honor, I'm sorry,
10 you're looking at me so I assume you would like me to respond.
11 Your Honor, there was a hearing as counsel notes on September
12 27, 2004. That hearing involved third party subpoenas that
13 were noticed on more than 21 days notice. The issue before the
14 Court was whether having noticed those subpoenas because of
15 scheduling changes among the third parties whether those
16 depositions could proceed on less than 21 days notice having
17 been previously noticed properly.

18 THE COURT: The date of that again was September--

19 MR. NALVEN: September 27, 2004. But, Your Honor,
20 respectfully, you did not modify nor do I believe you intended
21 to modify Judge Saris' CMO 10 with your September 27th order.
22 What you said simply was with respect to properly noticed
23 subpoenas if there's a result of scheduling issues with the
24 non-parties the deposition needed to proceed on less than 21
25 days notice, having been properly noticed that it could proceed

1 on seven days notice. In fact, Your Honor, as I mentioned,
2 this is the second time that Harvard Pilgrim Community Health
3 has been subpoenaed in this proceeding, and I'll just note for
4 you, Your Honor, that the first time the defendants noticed the
5 deposition of Harvard Pilgrim they noticed it on exactly 21
6 days notice. It's only with respect to these last two
7 depositions, which bumped up against the December 3rd deadline
8 that the 21 day notice violated.

9 THE COURT: Well that's what's most bothersome to me,
10 you know, I mean--

11 MR. PALERMO: Well, Your Honor, on that front I would
12 note that the plaintiffs noticed the IMS request one day before
13 the close of discovery, Your Honor. That would not be
14 sufficient notice under the 21 day rule.

15 THE COURT: Well tit for tat is not the approach
16 here.

17 MR. PALERMO: And, and clearly given the delay till
18 now, Your Honor, in February the issue of the timing of the
19 notice, they've had ample notice and time now, Your Honor, to
20 address it.

21 MR. NALVEN: I only note, Your Honor, with respect to
22 the IMS request that was a document request not a deposition
23 notice not subject to CMO 10. That matter also has been
24 resolved.

25 THE COURT: All right. I'll take it under

1 advisement. I'll take a break and then I'll give you a
2 ruling.

3 MR. PALERMO: Your Honor, would you like me to
4 address the other issues that--

5 THE COURT: Sure.

6 MR. PALERMO: --plaintiffs' counsel raised?

7 THE COURT: Go through it all and then I'll take a
8 break and come back and give you a ruling.

9 MR. PALERMO: Well, Your Honor, there's clearly a
10 need for the discovery. It's relevant to the Massachusetts
11 Class three that the Court had certified and is clearly, it
12 goes to the heart of those allegations. Plaintiffs' counsel
13 had referenced the discovery against Blue Cross Blue Shield.
14 That is one, Blue Cross Blue Shield of Massachusetts, Your
15 Honor, that's one plan. Your Honor, we submit that one plan
16 alone is insufficient in terms of demonstrating industry
17 knowledge and the methodologies that are used by the plans.
18 Dey needs and the Track 2 defendants need discovery on industry
19 knowledge relating to the third party payers' understandings
20 and expectations and how they went about reimbursing. In terms
21 of the scope of the subpoena, there are issues relating to
22 cross subsidization between the brand and generic drugs. With
23 respect to the issue of Dey being a Track 2 defendant, Your
24 Honor, Track 2 defendants are entitled to take discovery and to
25 pursue discovery and Dey did so recognizing how the Court had

1 ruled in its class certification decision with respect to
2 certifying the Massachusetts class. That's the focus of that
3 discovery and it's clearly relevant to that discovery.

4 MR. NALVEN: Your Honor, I did not address the issues
5 of burden to the Massachusetts third party payers because
6 counsel for those third party payers are here today and I know
7 that they would like--

8 THE COURT: Uh-huh.

9 MR. NALVEN: --to be heard with respect to burden.

10 THE COURT: I'll hear you.

11 MS. BANNING: I'm at the end, Your Honor, Susan
12 Banning for Neighborhood Health Plan. With respect to
13 Neighborhood Health Plan that is our argument really, burden,
14 whether it is analyzed under an absent class member under Rule
15 45. In our view Dey has not made any showing that they need
16 discovery from this particular health plan or that the need
17 outweighs the significant burden.

18 THE COURT: How many subscribers do you have?

19 MS. BANNING: We have approximately 125,000 members,
20 Your Honor, and approximately 300 employees. What NHP does, it
21 was founded to serve, bring managed care to underserved
22 populations. Today approximately 80% of its members are on
23 Medicaid and what NHP does is it contracts with Mass Health.
24 It's a Mass Health managed care organization to provide that
25 care. NHP does not have any in-house counsel. It has on staff

1 a grand total of two pharmacists, one of which has already
2 spent significant time going through these requests and trying
3 to analyze what would be needed. NHP certainly is not a major
4 national insurer or anything like the things that other people
5 have been talking about.

6 What we did try to do, Your Honor, and even that took
7 a significant amount of time, and I heard a lot about timing
8 and obviously when I got this subpoena I did not know of all
9 these various orders, but just with respect to NHP, Your Honor,
10 contrary to what Dey says, the subpoena to NHP, the original
11 subpoena, was served on November 14th. The documents were due
12 on November 23rd. The deposition was scheduled for December 2nd.
13 I sent three separate pieces of correspondence to Dey including
14 objections, did not get a response, and that was when we filed
15 the motion for a protective order. They never would even tell
16 me that they were taken the deposition off for December 2nd.
17 They did not tell me plaintiffs had filed a motion. I had to
18 get that information by calling around to other people.

19 After all this happened, Your Honor, Dey sent what
20 they called a reduced list of drugs and a reduced list of
21 requests. And we did nonetheless try to respond to that
22 despite all of these different motions that are outstanding.
23 And in document number 2089, Your Honor, and the attachment 1
24 to that, it's our motion to file a supplemental affidavit of
25 Pamela Siren. And what we try to do in that in the event Your

1 Honor does order discovery is in paragraph 10 NHP explains
2 what they could produce from the reduced list tabbing it to
3 their different request, and in paragraph 10 of that affidavit
4 it lists things like physician fee schedules, contracts with
5 current and former PBM's et cetera. But what NHP also does is
6 try to explain why with respect to their size and their
7 resources in both this affidavit and the other affidavit of
8 Ms. Siren, this would be an incredible burden and those
9 arguments, Your Honor, range from everything that we cannot
10 access our information by J codes. And the best way to see the
11 dramatic difference is between this J code list of many drugs
12 and the way NHP accesses its drugs is to look at Judge Saris'
13 list of drugs and the recent order. That is how they foresee
14 then can access drugs. They go onto explain why things like
15 trying to retrieve every piece of correspondence with
16 providers, every contract out there which there are over 5,000
17 on site, the rest stored, is for this size organization an
18 incredible burden and so, again, even with the reduced list we
19 did try to say what we could produce with the original list.
20 We filed a variety of objections.

21 THE COURT: Now you're non-profit?

22 MS. BANNING: Yes, Your Honor, we are.

23 THE COURT: All right.

24 MR. PALERMO: Your Honor, I'm sorry, would you like
25 me to address the burden issues with respect to each--

1 THE COURT: Well one each time if it's easier for
2 you to keep track of the argument. Go ahead.

3 MR. PALERMO: Thank you, Your Honor. Your Honor,
4 with respect to the issue of the communications with Dey upon
5 receipt of the subpoena that's addressed in our papers, Your
6 Honor, their communications were misaddressed to a lawyer. It
7 should have been addressed to one lawyer, Kelley Drye, and they
8 got the person's name wrong, so we were unaware of that
9 communication till a subsequent communication with my associate
10 Ms. Trewick and as soon as we became aware of that we
11 communicated with them. We've expressed our willingness to try
12 and work with them to narrow the scope. We continue to be
13 willing to try and address issues relating to burden but they
14 are--

15 THE COURT: What's the significance of such a small
16 plan?

17 MR. PALERMO: Well, Your Honor, we're trying, the
18 allegations in the complaint are so broad that we want to get a
19 cross section of plans. Blue Cross Blue Shield obviously is a
20 very large plan, Your Honor. Tufts and Harvard Pilgrim are
21 smaller plans and Neighborhood and Fallon are smaller scope
22 plans so what we've tried to do is get a range of plans, Your
23 Honor, and we think that the four subpoenas are not excessive
24 and that it's important for us to be able to have discovery
25 relating to, again, a cross section of those plans.

1 THE COURT: Ms. Josephson?

2 MS. JOSEPHSON: Thank you. Your Honor, Tufts
3 associated Health Plan is the operational arm of a number of
4 related Massachusetts related third party payers that I'll just
5 refer to as Tufts Health Plan. It's the third largest--

6 THE COURT: Covering how many people?

7 MS. JOSEPHSON: It covers just over 600,000 members,
8 and this makes Tufts Health Plan comparable in size as counsel
9 for Dey has just said to Harvard Pilgrim whose enrollment is
10 somewhere between 700 and 800,000 members. In fact, Dey Inc.
11 concedes in its opposition papers to the plaintiffs' motion for
12 protective order that it actually chose to direct the subpoena
13 to Tufts Health Plan precisely because it was comparable in
14 size to Harvard Pilgrim. But the defendants have already
15 obtained discovery from Harvard Pilgrim from this comparable
16 health plan. So in seeking discovery from Tufts Health Plan
17 Dey Inc. is going beyond a representative sample here and it's
18 seeking discovery of the only two health plans in this
19 particular size bracket, Harvard Pilgrim and Tufts.

20 There's no dispute and Dey seems to concede that it
21 is entitled to discovery from absent class members such as
22 Tufts Health Plan really only on a showing of need and it has
23 to meet several criteria including two that I wanted to talk
24 about. First, upon a showing that the discovery is not unduly
25 burdensome. And second, that the information is not available

1 from the representative parties. Now, the central
2 justification for issuing these subpoenas to all of these
3 Massachusetts health plans in the first place, and you'll see
4 it in the memos in opposition, was that at the time the
5 subpoenas were issued there were actually no Massachusetts
6 health plans that were parties to this case, and that was true
7 at that time. But everything has changed because this past
8 Monday on January 30th when Judge Saris issued the consolidated
9 order she certified Blue Cross Blue Shield of Massachusetts as
10 a representative party of Massachusetts third party payers.
11 So that problem that the defendants had that justified these
12 subpoenas is solved. There is no more need to take this broad
13 sample now that you have a clearly certified representative of
14 this class of third party payers that's an actual party to the
15 case. The question at this point is why and how badly do the
16 defendants need discovery from Tufts Health Plan? What could
17 Tufts Health Plan actually offer here that's not cumulative or
18 duplicative where there is now a representative Massachusetts
19 health plan who's a plaintiff in this case and where the
20 defendants already have discovery from a health plan that it
21 concedes is actually comparable in size to Tufts Health Plan.
22 Between discovery from Blue Cross Blue Shield and Harvard, the
23 defendants already have information that covers more than 50%,
24 I have no idea of the percentage, but close to 3,000,000
25 covered lives in Massachusetts, there is no need to seek

1 discovery from Tufts Health Plan.

2 There also can be no material dispute, there's been
3 no dispute to the information we've provided by affidavit and
4 supplemental affidavit about the enormous time, expense, cost,
5 opportunity cost in terms of diverting attention from vital and
6 time sensitive business that Tufts Health Plan staff needs to
7 attend to that would be required in responding to this
8 subpoena. To comply just with Dey's narrowed request, the 12
9 document categories that it sent as a compromise proposal, to
10 comply just with that we would estimate would require 1,500
11 hours of time, nine months of a full-time equivalence time just
12 to retrieve and organize the information for production, and
13 the cost of this labor alone comes to just short of \$80,000.
14 After retrieval of this information, it would then have to be
15 reviewed for responsiveness, confidentiality designations and
16 assertions of privilege.

17 And there's one other thing that I can't
18 overemphasize, the addition of Blue Cross Blue Shield as a
19 party to this case adds another even more critical and to Tufts
20 Health Plan disturbing cost to production in this case. Blue
21 Cross Blue Shield of Massachusetts is Tufts Health Plan's
22 largest competitor in a brutally competitive and small market.
23 Dey has not asked only for fee schedules pertaining to drug
24 reimbursement but for provider contracts that show exactly what
25 Tufts Health Plan pays its doctors, the very same doctors that

1 Blue Cross Blue Shield of Massachusetts negotiates with when
2 all of these health insurers who are competitors set
3 reimbursement rates, again, not just for drug prices but for
4 the services that are rendered. There's absolutely no reason
5 why simply because Tufts meets certain criteria of class
6 membership in this case that it must deliver up to its largest
7 competitor its provider contracts. That is the most sensitive,
8 competitively sensitive proprietary information that Tufts has.
9 There is no prior order or ruling in this case that would
10 require such a result. Every time this Court or Judge Saris
11 has ordered production from absent class members or potential
12 absent class members, it satisfied itself that there is an
13 actual need for this information and that there are no undo
14 confidentiality concerns.

15 The Court has also frequently conditioned discovery
16 of absent class members upon the defendants' payments of cost
17 and expenses. On November 2nd, for example, this Court ordered
18 the defendants to pay absent class members for the reasonable
19 cost of transportation and related expenses, attorney's fees,
20 and lost income involved in appearing for deposition. On
21 January 27th this Court ordered Health Net to provide redacted
22 claims data to the defendants as part of its core industry
23 sample with the defendants to pay the cost of retrieval. We
24 have offered actually to provide, before Blue Cross Blue Shield
25 became a party to this case, we have offered to provide our fee

1 schedules. We have offered to provide claims data and even
2 sample provider contracts with proprietary information
3 redacted. If the defendants would pay for that effort and if
4 the confidentiality order that is currently existing in this
5 case were tightened up in one respect and the respect that we
6 ask for is this, that the expert certification on the highly
7 confidential protective order would be tightened up to make
8 sure that the expert also certifies essentially the same thing
9 that in-house counsel certifies, that the expert that's
10 reviewing this information has no business conflict of interest
11 and that the expert is not involved in actually advising either
12 health care providers or others negotiating with health care
13 providers on reimbursement rates. Those suggestions were
14 rejected by Dey.

15 We would also have no objection if discovery from
16 Tufts is actually ordered at all to describe in general terms
17 in a deposition how AWP actually factors into contract
18 negotiations generally as long as we're not required to
19 disclose to Blue Cross Blue Shield under any circumstances
20 directly or indirectly the precise terms of the deal that we
21 strike with our physician and physician groups. We would
22 actually have to consider seriously opting out of this class if
23 that would protect us and prevent us from having to disclose
24 that and that's a result to be avoided because that would allow
25 the defendants actually to be using discovery as a weapon--

1 THE COURT: Uh-huh.

2 MS. JOSEPHSON: --and to reduce potential claimants.
3 So Dey has not agreed to this limited production or to payment
4 of anything beyond claims data retrieval costs or to enhanced
5 confidentiality protection and essentially stands by its
6 subpoena even though it's overreaching in several respects. It
7 stands by a list of subject drugs that is far different and far
8 broader than was attached to the consolidated order that Judge
9 Saris issued on Monday. I'm willing to settle for fees
10 schedules, claims data and sample contracts. Dey wants all of
11 Tufts documents not only that reflect reimbursement for drugs
12 but all documents reflecting anyone's thinking about the price
13 of drugs and any communications with physicians about the price
14 of drugs or the cost of drugs over the entire 14 year period
15 that they're concerned about. This creates an unworkable
16 burden for Tufts. We would have to look through every document
17 we have to figure out if there is something that would
18 potentially be responsive to that request.

19 According to Judge Saris the open question in this
20 case is a simple one, is AWP relevant to health plans in
21 connection with setting reimbursement rates with physicians for
22 physician administered drugs? Dey Inc., the defendants, do not
23 need 14 years of provider contracts, 14 years of communications
24 with physicians, 14 years of committee meetings from defendants
25 that are or from absent class members that they already have

1 information from comparable ones. They just don't need this
2 information to answer that simple question. If there is to be
3 any discovery of Tufts Health Plan at all, we have a number of
4 conditions and I'd be happy to submit them in the form of a
5 proposed order but we would really--

6 THE COURT: Well that's the next step. So let's--

7 MS. JOSEPSON: Okay. We'd ask this Court to
8 seriously consider the position that we urging here that the
9 defendants have what they need now with the representative
10 party named as a party and with the comparable discovery from
11 Harvard Pilgrim. Thank you.

12 THE COURT: All right, on behalf of Fallon? Do you
13 want to respond?

14 MR. PALERMO: However Your Honor would prefer.

15 THE COURT: No, we'll do it one on one so go ahead.

16 MR. PALERMO: Okay.

17 THE COURT: I'll hear you.

18 MR. PALERMO: Your Honor, with respect to the issues
19 relating to the confidentiality because of that information,
20 those issues were already raised and addressed by the Court in
21 the Health Net motion to compel where the Court ruled on
22 January 27th of last year ruling that the confidentiality order
23 is in place to protected third parties, Your Honor, and we
24 believe that the orders that are currently in place to provide
25 sufficient protection to third party payers including Tufts and

1 the other third party plans.

2 With respect to the issue of the burden, Your Honor,
3 again, we're looking at the complaint. The scope of the
4 complaint is what it is, Your Honor, and the allegations in the
5 case go to the issues we've identified in our request, we've
6 narrowed the request. We're willing to try and work with Tufts
7 and the other entities to resolve them. And, Your Honor, I
8 think the experience with respect to the plans that it
9 previously responded to subpoenas is inconsistent with the
10 representations about the burden that Tufts identifies. And
11 with respect to the issue of Blue Cross Blue Shield
12 Massachusetts, Your Honor, given their size in Massachusetts,
13 we think that the other subpoenas and information from the
14 other plans are necessary to get the cross section that we've
15 identified. The different size plans, their knowledge if we
16 can demonstrate that plans that are smaller than Blue Cross
17 Blue Shield have knowledge concerning an understanding of what
18 AWP is and how they go about reimbursing, obviously I think
19 that's highly relevant to the case and not-for-profit plans
20 aren't exempt from the discovery but just because they're not
21 for profits. Your Honor, I think consistent with the Court's
22 prior rulings we're entitled to get this discovery and with
23 respect to the burden issues, Your Honor, I think that we can
24 work with Tufts to try and resolve those issues consistent with
25 getting the discovery that's been ordered in prior instances.

1 Thank you, Your Honor.

2 THE COURT: All right. Do you want to reply briefly?

3 MS. JOSEPHSON: Could I just very, very briefly. I
4 just wanted to point out because counsel for Dey referenced the
5 action that you took on the Health Net issue, this is the
6 transcript of that hearing is attached to document 1940-1 at
7 Exhibit E, and in that hearing it was very clear that one of
8 the factors that the defendants brought forward to convince you
9 to order discovery from Health Net was that there was no
10 competitive relationship between Health Net and any of the
11 parties in the case, also, that the defendants only sought a
12 representative sample of contracts and that is sample not what
13 their position is here. Thank you.

14 THE COURT: All right, on behalf of Fallon?

15 MR. SATURLEY: Thank you, Your Honor, William
16 Saturley on behalf of Fallon Community Health Plan. Fallon has
17 171,000 members, Your Honor, and they are largely located in
18 Worcester County in the Commonwealth. My brothers have already
19 ably dealt with whether or not there's a benefit to the
20 defendants of pursuing this subpoena issuance, and so I will
21 certainly pass over that other than I endorse the arguments
22 that have been made by Attorney Nalven.

23 We've only been involved in this, my law firm, since
24 December 22nd and so there's been an awful lot--

25 THE COURT: You're lucky.

1 MR. SATURLEY: --to try to catch up with, and I'm
2 hoping you'll let me stay lucky, Your Honor, and grant our
3 motion because from our standpoint while the subpoena that was
4 served on Fallon maybe a narrowed subpoena it's quite
5 significant. It asks for in essence if read largely and on its
6 face, it essentially asks for every piece of paper that Fallon
7 has generated or collected in one form or other for the past 14
8 years.

9 The first document request seeks all schedules
10 disclosing the amounts reimbursed to physicians for any
11 services rendered or drugs administered. Your Honor, the way
12 that Fallon does its business is it signs a separate contract
13 with every physician or every entity that employs physician or
14 every provider every year. That's on average 8,000 contracts
15 per year times 14 years is approximately 110 to 120,000
16 contracts. In order to determine and to go through the process
17 of reviewing those contracts to strike them for privilege, to
18 determine whether they were responsive at all, to worry about
19 the commercial information that my sister has addressed, would
20 require just in and of itself the equivalent of 50,000 hours
21 worth of work. Fallon cannot meet that burden. That's just
22 the first category of 12.

23 The second category, for instance, please give us all
24 electronic claims data, in essence is what it says. Fallon
25 receives tens of thousands of electronic claims every day. In

1 order to comply with a request that would entail a review of
2 millions of claims. There is no electronic computer search
3 mechanism that would allow us to respond to the subpoena and go
4 through the process we would need to in order to determine if
5 those records were compliant, determine if there was
6 information in there that we should not produce. So, again,
7 we're talking a manual review process. Fallon has already told
8 you in the context of the companies that are involved here is
9 very small. It has a total of 525 employees, 200 of them in
10 the administrative capacity. They're all very busy. The
11 affidavit of Daniel Conquer, which is document number 2783,
12 sets forth the other things that Fallon is doing today. Fallon
13 is trying to convert all of its records and answer multiple
14 inquiries just with regards to the Medicare Part D change that
15 was made with regards to the health reinsurance business as of
16 January 1. Fallon is also preparing for a Medicaid site visit
17 upcoming. Fallon is undergoing a Department of Insurance
18 investigation right now, an annual site visit. Fallon is
19 preparing for its two week audit in order to file its 501(c)(3)
20 information, et cetera, et cetera, et cetera. Fallon's staff
21 are working up to 80 hours a week now to comply with their
22 existing obligations. To undertake any response to the
23 subpoena as stands or even as what might, from your situation
24 might appear to be a reasonable accommodation, why not do it
25 for instance for the past three years all the records on site

1 as opposed to iron mountain still remains an overwhelming and
2 unreasonable burden to Fallon.

3 I will say that we have communicated with counsel for
4 Dey. They have been polite. They have been responsive. We
5 haven't had any problem talking with each other, but we are up
6 against the unassailable fact to respond to the subpoena either
7 as stated or as modified in a way that would be acceptable to
8 Dey is an incredible, unreasonable burden to a very small
9 company. And we ask under those circumstances that you just
10 say, that's not necessary, the subpoena on Fallon is squashed.
11 Thank you.

12 MR. PALERMO: Your Honor--

13 THE COURT: Clearly the theme all the way across the
14 board with all three entities is burden here.

15 MR. PALERMO: Well, Your Honor, in the last argument
16 counsel's argument seemed to be that any response would be too
17 burdensome because they're too busy with all the other things
18 that they have to do. What we've tried to do with our narrowed
19 request, Your Honor, is narrow them to exactly the same
20 discovery that Your Honor has permitted on numerous prior
21 occasions. The Court has previously ordered discovery from
22 Blue Cross Blue Shield and Mutual of Omaha even though they're
23 small plans. Small plans are particularly relevant here with
24 respect their knowledge of reimbursement and their methodology,
25 and they're highly relevant to the allegations that are at the

1 heart of this case, Your Honor. And we have really tried to
2 narrow those requests and tried to be consistent with what's
3 been permitted over and over and over again. Thank you, Your
4 Honor.

5 THE COURT: All right. I'll take the morning recess
6 at this time. All right, 10 minutes.

7 (RECESS)

8 THE COURT: All right, having given the matter some
9 further thought and having heard extensive argument in
10 reference to docket entries 1907, 1909, 1910, 1914, 2005 and
11 2091, I will grant the plaintiffs' motion for protective orders
12 in those individual motions, and I will grant the motions to
13 quash as well. Having reevaluated the situation and having
14 heard really very extensive argument on burdensomeness today, I
15 believe that the presence of Blue Cross Blue Shield in the
16 litigation at this time does change things, and I feel that the
17 oppressiveness of the burden as has been outlined by counsel
18 for the three health plans is quite dramatic. I'm also
19 concerned about the issues of confidentiality. I think there
20 are serious confidentiality issues here in a competitive
21 situation, and for that reason I'm very much concerned about
22 the rights of the non-parties and, therefore, grant the
23 motions.

24 All right, I believe we have one remaining motion and
25 that is 1820, which is plaintiffs' motion to compel production

1 of Amgen.

2 MR. NALVEN: Your Honor, this will be a brief motion.
3 I didn't know if you wanted to excuse counsel who had already
4 been heard?

5 THE COURT: Yes. If counsel who have been heard
6 don't want to stay for the remainder, you're welcome to leave
7 at this time.

8 MR. YOUNG: Your Honor, I didn't have an opportunity
9 to introduce myself earlier. My name is Joseph Young. I'm
10 with the law firm of Hogan & Hartson in Baltimore. I represent
11 Amgen Inc.

12 THE COURT: And the spelling of your last name?

13 MR. YOUNG: Young, Y-O-U-N-G--

14 THE COURT: Oh.

15 MR. YOUNG: --Your Honor.

16 MR. COMMISSO: Good morning, Your Honor, John
17 Commisso of Kelly Libby & Hoopes. That's Commisso, C-O-M-M-I-
18 S-S-O.

19 THE COURT: We know that, Mr. Commisso, having had
20 you in court yesterday.

21 MR. NALVEN: Your Honor, I know that it's been a long
22 morning so I'll be brief on this motion.

23 THE COURT: Well not as long as many others.

24 MR. NALVEN: Your Honor, Amgen is one of the Track 2
25 defendants in this case and Amgen manufactures a drug by the

1 name of Aranesp among others which is a competitor of the drug
2 Procrit which is a drug manufactured by Johnson and Johnson.
3 These drugs are chemically identical. And I raised that with
4 Your Honor at the outset just to assure you that as Your Honor
5 knows the drugs that are at issue in the cases has changed--

6 THE COURT: Uh-huh.

7 MR. NALVEN: --have changed over the course of the
8 case but the heartland of the case has always been physician
9 administered drugs where there's either therapeutic or chemical
10 identity and so Amgen's manufacture of Aranesp makes Amgen a
11 central focus of the AWP MDL. I think the papers candidly
12 submitted by both parties fairly fully explore the issues for
13 Your Honor but I'll summarize briefly. The plaintiffs served
14 several document requests on Amgen beginning in late 2003 and
15 into early 2004, including what might be referred to as a
16 summary or omnibus request in March of 2004. There was no
17 production by Amgen at that time. The papers I think by both
18 sides sort of identify a series of communications that Your
19 Honor probably doesn't want to get bogged down in about who
20 acted first and who acted next, but I think what's significant
21 to understand is that by May of 2005 plaintiffs were closely
22 focused on obtaining discovery from Amgen and in fact on May
23 26th of 2005 my partner Steve Berman provided counsel for Amgen
24 with a very detailed memo, it was actually an internal memo but
25 it was provided without waiver, and I think for that reason

1 counsel did not attach it to his papers. But it was a very
2 detailed memo identifying the categories of documents that
3 would satisfy plaintiffs in connection with the earlier
4 document request.

5 At the time that we filed this motion, which was
6 October of 2005, plaintiffs still had not received any
7 production from Amgen of a documentary nature. Plaintiffs had
8 only received some transactional data. Now remember that at
9 the time that we filed that motion, the discovery cutoff for
10 Track 2 which is still in place, although there's a motion
11 pending concerning this matter, was December 3rd, and even as
12 recently, I think shortly after the motion was filed Amgen did
13 begin to produce some documents. As of a couple of days ago
14 I'm told by one of my colleagues that Amgen has produced about
15 43,000 pages of documents and has represented that it believes
16 its production to be complete. We believe the production to be
17 far, far, far from complete. As Your Honor knows the primary
18 focus in terms of company of my work in this proceeding has
19 been Glaxosmithkline and I can tell you that Glaxosmithkline,
20 for example, produced in excess of 3,000,000 pages of
21 documents.

22 THE COURT: Yes, but how can you say it until you've
23 really taken a look?

24 MR. NALVEN: Well, we are taking a look, Your Honor,
25 but at this point we can really identify for you one very

1 specific and very troubling issue in this case or actually I
2 would take two specific and troubling issues. The first is
3 that as a result of the very, very late production and what we
4 believe to be, we know to be a partial production, we don't
5 know how partial, at this point plaintiffs have been very
6 seriously prejudiced. We have discovery - the discovery period
7 already ended and we're only beginning to receive documents
8 now. Except for some initial 30(b)(6) depositions we were
9 unable to take depositions that were meaningful because we
10 didn't have documents. Amgen, whatever its excuses for not
11 producing documents prior to let's say May of 2005, certainly
12 by May there was no question that it was very clear what it is
13 we were looking for, and sat on our requests for an additional
14 period of time and in fact did not begin producing until we
15 filed. In our motion we are asking for sanctions which will
16 allow us not only to obtain documents more quickly but also
17 will send the message to Amgen and defendants that the Court is
18 not going to tolerate violations of CMO's and discovery
19 obligations.

20 The second issue that is of very special concern,
21 Your Honor, is the time period that Amgen claims it has to
22 produce documents with respect to. Amgen has taken the
23 position in this case that it need only produce documents for
24 the period 1997 to 2001 or sort of creeping into 2002. Sort of
25 at the last exchange between one of my colleagues and Amgen's

1 counsel, Amgen's counsel said that it would return to its
2 client to see whether that position could be modified, but that
3 position is inconsistent with the complaint in this case which
4 seeks data and documents since 1991. The conduct of other
5 defendants in the case, including Glaxosmithkline which for
6 example Your Honor produced documents from 1991, and it's
7 inconsistent most importantly with Judge Saris' recent class
8 certification order which certifies a class for the period 1991
9 to 2005. Plaintiffs need this critical information from this
10 critical defendant promptly, a full production promptly for the
11 entire class period. So in addition to, among the sanctions
12 that we seek, Your Honor, among the relief that we seek in
13 terms of prompt production is a full and complete production
14 that at this point is now within the next 60 days in order to
15 review the documents and prepare for further testimonial
16 discovery. Thank you, Your Honor.

17 THE COURT: All right, I'll hear you, Mr. Young.

18 MR. YOUNG: Thank you, Your Honor. First, I think
19 the Court needs to focus on what it has before it. The motion
20 that was filed in October was a motion for sanctions based on
21 essentially what plaintiffs claim was Amgen's complete refusal
22 to conduct discovery. And the documents that were attached to
23 our briefs, let me make clear that there was no waiver, objects
24 were timely filed, they were all pursuant to express
25 understandings and agreements with plaintiffs' counsel, not Mr.

1 Nalven but his other lawyers in his office, and that there is
2 in fact a documented record of that exchange.

3 We, also I think, and this is important in thinking
4 through other sanctions are at all appropriate in this context,
5 Amgen did early on push for a meet and confer as of last
6 December and it did take five months for a sit down and a final
7 meeting with Mr. Nalven's partner to get the list that he
8 described, the detailed list that narrowed the production, in
9 fact narrowed the production in order to avoid the 3,000,000
10 page production that Mr. Nalven commented about from another
11 defendant in the Track 1 case. Our purpose was to focus it,
12 narrow it, make it tight so that it's not a strict, you know, a
13 broad data dump. The data was provided within a month of that
14 time pursuant to a request to modify the original data request
15 that had been made. That took time with the experts, and we
16 began reviewing over the summer.

17 The production was made beginning of October and it
18 was made in fact the day after plaintiffs had filed their
19 motion to compel. Had they called and said we're about to file
20 a motion to compel, we would have said we're filing our
21 documents Monday. But the document production began in
22 October, which was consistent with our representations to Judge
23 Saris in connection with the scheduling issue that was filed in
24 late September and early October on Track 2 discovery, and it
25 continued on a rolling production through December and

1 completed in January. We are substantially completed the
2 production of the limited discovery requests that were the
3 result of a meet and confer with Mr. Berman in May.

4 So, first, with respect to the motion to compel on
5 for sanctions with respect to discovery, Amgen believes that it
6 did work in good faith to resolve issues, that the parties
7 understood that and the production proceeded accordingly. And
8 in fact, had we gotten in December of 2004 where we were in May
9 of 2005, it would have all been over by July and none of us
10 would be here this morning.

11 With respect to the two troubling issues that
12 Mr. Nalven refers to, the timing of production and the effect
13 on discovery scheduling, that is precisely the issue before
14 Judge Saris on two competing CMO's that were submitted in
15 December of 2005. The plaintiffs use the same kinds of
16 arguments with respect to defendants' productions, not just
17 Amgen's, but a broad number of defendants, and requesting an
18 extension of discovery till June. The defendants in the Track
19 2 have requested or suggested an extension to allow additional
20 discovery through March. I think an important point there is
21 that both parties understood and in fact Judge Saris in what
22 has been called her holiday order understood that December 3rd
23 wasn't likely to be the firm cutoff, that the parties, I think
24 she said, shouldn't kill themselves over the holidays, and she
25 was going to deal with scheduling after, my guess is after she

1 dealt with the Track 1 house and put that in order that she'd
2 then deal with Track 2 and the parties are waiting on that
3 schedule from Judge Saris at this time.

4 On the timeframe issues, Your Honor, I do not believe
5 that that is properly before the Court this morning. It is not
6 the subject of the motion to compel. There is not a word in
7 their motion to compel with respect to timeframe. And in fact,
8 it was not something that was even discussed when Mr. Berman
9 and Mr. Barley and I met by telephone back in May. The first
10 occasion that the timeframe exception that Amgen put into its
11 objection was back in 2004 and repeated in June of 2005 over
12 initial production. The first reference to that was in a
13 letter on January 9, 2006, about two weeks ago. And I think
14 more important, more to point, we have been involved in meet
15 and confers with Mr. Nalven's associate in the Seattle office,
16 Rob Lopez, as late as Tuesday and have made I believe
17 substantial progress on a number of the categories of documents
18 and what accommodations could be made and Amgen would be
19 willing to make.

20 In light of Judge Saris' order with respect to the
21 Track 1 class certification, the plaintiffs have now taken the
22 position that discovery must be from 1991 through January 1,
23 2006, through to the present, which is two - well, first of all
24 it's beyond anything that's been requested of any other
25 defendant in the case that I'm aware of beyond what they

1 negotiated with other defendants and I think, frankly, beyond
2 what Judge Saris probably contemplated. I don't believe that
3 in certifying that class she was thinking about reopening
4 discovery or reopening document productions for the Track 1 or
5 the Track 2 defendants. I think that the key here is to focus
6 on documents that are central to the timeframe of the alleged
7 scheme that the plaintiffs have presented, which is 1997, five
8 years prior according to the defendants through to the date of
9 the filing of those first complaints in 2001 and 2002, and they
10 will involve the core documents that, you know, that the
11 plaintiffs need. Mr. Nalven mentioned Aranesp and Procrit;
12 well Aranesp was preceded by a drug called Ibogen and Ibogen
13 and Procrit are also competitive drugs, and there are clearly
14 documents encompassed in our five year production that meet the
15 plaintiffs' request and meet their needs with respect to
16 showing if there was a competitive effect and how that
17 competitive effect led to pricing.

18 THE COURT: Briefly.

19 MR. NALVEN: Your Honor, I think you can hear from
20 both arguments that there is not really a great deal of dispute
21 here, critical points. To begin with, counsel says that the
22 motion before Your Honor doesn't cover the timeframe issue.
23 Well, of course the motion that was before Your Honor was
24 before was served before any documents were produced. Clearly
25 the timeframe issue is subsumed in a motion in which somebody,

1 which is made in response to no document production. With
2 respect to the timeframe itself, counsel does not dispute that
3 the period for production ought to be the period set forth in
4 Judge Saris' class certification order and doesn't dispute in
5 any way the propriety of the demand for production from 1991 to
6 1997. The issue that he raises is whether the production ought
7 to be, ought to end at the end of the class period or whether
8 because some defendants who produced promptly in response to
9 the omnibus request that was served in March of 2004, whether
10 Amgen ought to get the same benefit that they did where on a
11 defendant by defendant basis there have been different
12 agreements and arrangements made depending on how the case
13 proceeds. For example, with Glaxosmithkline we have an
14 agreement that allowed Glaxosmithkline to forbear from
15 producing its most recent transactional data pending summary
16 judgment or some other milestone in the case.

17 In terms of the time at which or the deadline for
18 production, as Your Honor knows there are motions before Judge
19 Saris to extend that period of time. Plaintiffs now are
20 helpless. We don't know what the period is but we know that
21 it's going to be sometime in the next few months and we still
22 don't have anywhere near a full production. So we request -
23 one other point, Your Honor, Mr. Young said that he was
24 involved in active, an active meet and confer discussion and
25 I've talked extensively with my colleagues in Seattle about

1 this, and my colleagues in Seattle have notified Mr. Young and
2 have told me that while the discussions have been cordial, that
3 at this point they're going nowhere and that there is no longer
4 a fruitful meet and confer. Our position is that we need
5 documents for the entire period and we need them in sufficient
6 time to review them and to take some depositions.

7 THE COURT: What's your position, Mr. Young, on the
8 completion of what you intend to produce at this time?

9 MR. YOUNG: Your Honor, the documents that Amgen
10 produced in response to the narrowed request that Mr. Berman
11 provided to us in May that is essentially complete. The
12 shortcomings that Mr. Nalven is referring to, I received my
13 first notice of that last night in an email sent after hours to
14 me to which I responded this morning from his associate in
15 their Seattle office. They're not at issue this morning in any
16 event. We're trying to work through with them, and I guess
17 what I'm asking Your Honor is allow us to use the process that
18 the local rules establish. We're trying to do that. The most
19 recent conversation was on Tuesday of this week at which time I
20 was promised to get a letter that I could provide my client and
21 I, at least my position with Mr. Lopez was I want to review
22 that with my client, I want to see what we can provide and what
23 we can't or what we can agree on and there were categories that
24 we agreed on that we would assent to. And as far as I'm
25 concerned that process is still an open one, and if we need to

1 come back to the Court in two weeks or three weeks or whenever
2 we need to, we can do it at that time, but it's simply not ripe
3 at this time.

4 THE COURT: Yeah, I think based on what's happened
5 this motion as it's framed presently is now moot, and if you
6 need to renew it you may. All right.

7 MR. YOUNG: I appreciate that, Your Honor. Thank
8 you.

9 THE COURT: I think that resolves everything that's
10 on the table for today. Any counsel want to raise anything
11 else?

12 (Pause)

13 THE COURT: All right. Then we stand in recess.

14 MR. NALVEN: Thank you, Your Honor.

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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

February 24, 2006

Maryann V. Young